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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ERNESTO FUENTES, Appellant.	2 CA-CR 2007-0343 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063192

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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E S P I N O S A, Judge.

¶1 Following a bench trial, Ernesto Fuentes was convicted of one count of possession of drug paraphernalia, a class 6 felony. The trial court reduced the conviction to a class 1 misdemeanor and sentenced him to twelve months' unsupervised probation. On appeal, Fuentes argues the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and in failing to require proof that the paraphernalia was found with a "usable amount" of drugs. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's verdict and resolve all reasonable inferences against the appellant. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). On July 7, 2006, Officer Victor Garcia of the Tucson Police Department observed Fuentes walking toward a bar on Fourth Avenue in Tucson. After Garcia identified Fuentes and conducted a records check, he discovered an outstanding warrant for his arrest. Garcia arrested Fuentes and observed Officer Bollingmo search him. Among other things, Bollingmo found a wallet on Fuentes's person, which he gave to Officer Jesse Chamberlain, who transported Fuentes to the Pima County Jail.

¶3 Upon arrival at the jail, Chamberlain processed Fuentes for booking. While transferring Fuentes's personal property to a property clerk, an inventory of the wallet's contents revealed a white powdery substance "folded up inside [a dollar] bill." The substance tested positively for cocaine.

Sufficiency of the Evidence

¶4 In reviewing the denial of a Rule 20 motion, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena,* 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is such proof as "'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers,* 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones,* 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Substantial evidence may be either circumstantial or direct. *See State v. Mosley*, 119 Ariz. 393, 402, 581 P.2d 238, 247 (1978). We do not reweigh the evidence to decide if we would have reached the same result as the trier of fact. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶5 In challenging the sufficiency of the evidence, Fuentes first argues the state failed to establish sufficient foundation to admit the officers' testimony regarding the dollar bill, wallet, and cocaine. For proper evidentiary foundation to exist, there must be sufficient evidence to support a finding that the offered evidence is what its proponent claims it to be. Ariz. R. Evid. 901(a); *see State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). When admitting physical items into evidence, foundation must be established by either identification testimony or chain of custody. *See State v. Ashelman*, 137 Ariz. 460, 465, 671 P.2d 901, 906 (1983). Fuentes's contention, however, is misplaced. The wallet, dollar bill, and cocaine were not offered or admitted into evidence, and thus, required no foundation.

And the state's failure to furnish physical evidence went to the weight of the officers' testimony, not its admissibility. *See generally State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991).

¶6 Fuentes further argues the evidence was insufficient to sustain his conviction because no physical evidence of paraphernalia was admitted at his trial. In response to Fuentes's Rule 20 motion, the trial judge acknowledged "somewhat contrary case law," but ultimately denied the motion and ruled the state could proceed without the admission of physical evidence of the narcotic or paraphernalia.

¶7 Under certain circumstances, a reasonable fact-finder can find that sufficient evidence of possession exists, notwithstanding the absence of physical evidence. *See State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003) (physical evidence not required for conviction when totality of circumstances demonstrates guilt beyond reasonable doubt); *see also State v. Blevins,* 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) (substantial evidence may be comprised of both circumstantial and direct evidence and "conviction may be sustained on circumstantial evidence alone"). The testimony of a single witness, if relevant and reliable, may be sufficient to support a conviction. *See State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978).

¶8 Garcia testified he had observed Bollingmo search Fuentes, remove his wallet, and keep it until Chamberlain arrived. Chamberlain testified Bollingmo had handed him the wallet and it had remained in his possession until Fuentes was booked at the police station.

At that time, Chamberlain placed the wallet into the "property bin" and observed Intake Support Specialist Karil Yamamoto remove a dollar bill from the wallet. She immediately turned the bill and wallet over to him, and he observed the white powder.[1] Chamberlain then transported the items to the main police station where he weighed the powder and conducted field tests. Reports were introduced into evidence showing the powder weighed .061 grams, and Chamberlain testified he had tested it using a NarcoPouch.[2] He labeled the remainder of the substance as "1-JC" and placed it into the station's evidence bin.

¶9 Quentin Peterson of the Tucson Police Department Crime Laboratory testified he had analyzed the contents of an evidence envelope labeled "1-JC," which contained "a Ziploc containing a folded paper, a folded dollar bill, and 30 milligrams of white narcotic substance," and discovered the powder contained cocaine. Although the testimony and reports submitted must be weighed against the absence of any physical evidence, "the credibility of a witness' testimony and the weight it should be given are issues particularly within the province of the jury." *See State v. Cox*, 217 Ariz. 353, ¶ 7, 174 P.3d 265, 269 (2007). A reasonable fact-finder could view the direct evidence in this case to be substantial. As such, we defer to the trial court's interpretation of the witnesses' testimony and evidence and find no error.

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[1]As Fuentes points out, Yamamoto testified she could "[n]ot specifically" recall booking Fuentes, receiving a wallet, or finding a folded-up dollar bill containing any substance.

[2]Chamberlain's testimony indicated that a NarcoPouch is a preliminary chemical test used by officers in the field to detect the presence of narcotics.

¶10 Fuentes also contends the evidence was insufficient to support his conviction given the state's failure to establish that Fuentes owned the seized wallet. While Chamberlain was questioned about his failure to check the wallet for identification, Fuentes did not specifically raise the issue of ownership below, and thus, has forfeited all but fundamental error review. *See* Ariz. R. Evid. 103(d); *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶11 Conviction of possession of paraphernalia does not require proof of ownership. *See* A.R.S. § 13-3415. Section 13-3415(E), provides fourteen "relevant factors" to be considered in determining whether an object is paraphernalia. Four of the factors state, with slight variations in language, that evidence of the intent of "the owner, or anyone in control of the object" is relevant. The clear implication of the statutory language is that the offense may be committed by "anyone in control of the object." Furthermore, the term "possession" is defined as a voluntary act in which the defendant "knowingly exercised dominion or control over property." A.R.S. § 13-105(31). Control, and not ownership, is the dispositive element of a possession charge. That Fuentes may not have been the owner of the wallet or its contents is of no moment.

Statutory Construction

¶12 Fuentes lastly asserts that "guilt [of possession of paraphernalia] is necessarily predicated on a finding of Appellant's guilt of possession of the drug itself" and that conviction under A.R.S. § 13-3415 therefore requires proof the paraphernalia was found with

a "usable amount" of drugs, which he contends the state failed to do. This court reviews issues of statutory construction *de novo*. *State v. Sharma*, 216 Ariz. 292, 296, ¶ 14, 165 P.3d 693, 697 (App. 2007). However, because Fuentes failed to raise this issue below, we again review only for fundamental error.

¶13 It is well-established that a person cannot be convicted of possession of a narcotic unless the state produces evidence that the defendant possessed a "usable amount" of the drug. *State v. Murray*, 162 Ariz. 211, 213, 782 P.2d 329, 331 (App. 1989). There is no such requirement for the offense of possession of drug paraphernalia. When interpreting the meaning of particular statutory provisions, we seek to discern the intent of the legislature. *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (Ariz. 1992). "A statute's language is 'the best and most reliable index' of its meaning." *Trust v. County of Yuma*, 205 Ariz. 272, ¶ 11, 69 P.3d 510, 512 (App. 2003), *quoting Janson v. Cristensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

¶14 Section 13-3415(E)(5) provides that one factor to be considered in determining whether an object is paraphernalia is "[t]he existence of any residue of drugs on the object." Interpreting the paraphernalia statute to require that objects be found with a "usable amount" of drugs would be inconsistent with the legislature's clear reference to "residue." Furthermore, eleven of the remaining thirteen statutory factors do not call for the presence of drugs in any quantity. Imposing a requirement that conviction for possession of

paraphernalia is proper only in conjunction with a "usable amount" of narcotics is contrary to the plain language of the statute. Thus, we find no error.

Disposition

¶15 Fuentes's conviction and sentence is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge